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In the Supreme Court of the United States

CENTRAL WEST VIRGINIA ENERGY COMPANY AND MASSEY ENERGY COMPANY,

Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires States to afford litigants at least one appeal as of right to review judgments awarding substantial compensatory and/or punitive damages.

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae are Joan Steinman, Distinguished Professor of Law at Chicago-Kent College of Law, and Margaret Stewart, Professor of Law at Chicago-Kent College of Law.[1] *Amici* write and teach in the areas of civil procedure, complex litigation, constitutional law, appellate courts and federal courts. *Amici* file solely as individuals and not on behalf of any institutions with which they are affiliated.

STATEMENT

This case presents an ideal vehicle to address the due process problems created by West Virginia's failure to provide an appeal of right following legally indefensible civil damages awards. West Virginia's system is more than a modern anomaly -- it is a historical abnormality that fails to comport with longstanding notions of procedural due process. Appellate review of civil judgments as a matter of right has been a venerable component of the English and American legal traditions. This Court should recognize that such an appeal is guaranteed by the Due Process Clause of the Fourteenth Amendment.

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[1] Neither of the parties has participated in the drafting of this brief. No person other than *amici* made a monetary contribution to the preparation or submission of this brief. Respondents consented to the filing of this brief by letter dated September 12, 2008, a copy of which has been filed with the Clerk of this Court.

ARGUMENT

I. THE RIGHT TO APPEAL A SUBSTANTIAL CIVIL DAMAGES AWARD IS HISTORICALLY WELL-GROUNDED.

For hundreds of years, the right to appeal civil judgments affecting substantial property interests has been a bedrock principle of the English and American legal systems. As Judge Coffin recognized, "[t]he opportunity to take one's case to 'a higher court' as a matter of right is one of the foundation stones of both our state and federal court systems." Frank M. Coffin, *The Ways of a Judge* 16 (1980). This traditional safeguard against unjustified deprivations of property in civil cases was well known to the drafters of the Fourteenth Amendment's Due Process Clause.

Appeals of right for all civil judgments were a procedural guarantee that American courts adopted from England, where "writs of error were available as a matter of right in civil cases." 3 W. Blackstone, *Commentaries on the Law of England* 406-11; *see also* 2 William Tidd, *The Practice of the Court of King's Bench*, in *Personal Actions* 72, 151 (Issac Riley, ed.) (1807) (in the King's Bench, a writ of error "lies of course" to review common law judgments); Coffin, *Ways of a Judge* at 33 (discussing the "English model of review" for all civil judgments, characterized by the right to "broad and unrestricted appeal to the Court of Quarter Sessions").

States incorporated the right to appeal civil judgments into their courts from early colonial times. As early as 1620, Virginia guaranteed that "[i]f any man find himself aggrieved by a lesser or ordinary

Court, he may appeal to a great and Quarter-Court, where the matter *shall be heard* and finally ordered." Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 Hastings L.J. 913, 945 (1997) (quoting 3 Peter Force, *Tracts and Other Papers Relating Principally to the Origin, Settlement and Progress of the Colonies in North America* (1947)) (emphasis added). By the 1640s, the right to appeal had become "a central component in the legal system of Massachusetts Bay and Rhode Island." Bilder, 48 Hastings L.J. at 943. Likewise, in New Jersey appellate review always was available for substantial deprivations of property, including "misdemeanor cases where a fine exceeding a certain amount was imposed as a sentence." David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. Crim. L. & Criminology 518, 537 (1990) (citing Lord Cornbury's Charter of 1702, New Jersey ("You are also to permit Appeals to us in Council, all Cases of Fines imposed for Misdemeanours; provided the Fines so imposed, amount to or exceed the value of two Hundred Pounds, the Appellant first giving good Security")). Accordingly "the colonists came to view wide-ranging, easily accessible appeal as something to which all had a right." Coffin, *Ways of a Judge* at 33.

This tradition of guaranteed appellate review continued into early Federal and State court systems. Through "the late eighteenth century * * * appeals from proceedings in equity and admiralty, and writs of error to secure review of judgments at common law, were available to appellants and petitioners in error as a matter of right." James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum. L. Rev.

1515, 1570 (2001). New York provided that "writs of error in all civil cases * * * shall be considered as writs of right and issue of course." Act of March 20, 1908 (1 N.Y. Rev. Laws 2000) (quoted in Rossman, 81 J. Crim. L. & Criminology at 541 n.110); *see also* William Wyche, *A Treatise on the Practice of the Supreme Court of Judicature of the State of New-York in Civil Actions* 272 (2d Ed. 1794) (noting that the "writ of error is a writ demandable of right in all civil cases"). In Connecticut, the writ of error was "a matter of right [to be] granted in all criminal cases, in the same manner as in civil cases." Z. Swift, *A Digest of the Laws of the State of Connecticut* 418 (1823) (quoted in Rossman, 81 J. Crim. L. & Criminology at 541 n.107). In Virginia, the writ of error for common law judgments remained "available by right, and the only requirement was that the defendant certify probable cause of an error existed." Rossman, 81 J. Crim. L. & Criminology at 542.

This long pedigree illustrates that West Virginia's peculiar judicial system -- the only system denying an appeal of right for substantial punitive damages awards -- is a "departure from traditional procedures," *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 421 (1994), resulting in "a dramatic difference between the judicial review of punitive damages awards under the common law" (*id.* at 426) and in West Virginia. Likewise, West Virginia's "abrogation of a well-established common-law protection against arbitrary deprivations of property" (*id.* at 430) and its disregard for "traditional practice" -- the "touchstone for constitutional analysis" of procedural due process (*ibid.*) -- suggests that West Virginia's appellate system fails to comport with the Fourteenth Amendment's Due Process Clause.

II. HISTORICAL DISTINCTIONS BETWEEN APPEALS FOLLOWING CIVIL JUDGMENTS AND CRIMINAL JUDGMENTS NEED NOT BE ABANDONED.

If this Court holds that the Due Process Clause guarantees an appeal of right following some or all civil judgments, this Court would not be *required* as a consequence to recognize a similar constitutional right to appeal criminal judgments. (Of course, the Court would not be precluded from so ruling in the criminal context.) Historically, appellate review has been guaranteed uniformly for civil judgments, but not criminal, judgments. Criminal defendants now enjoy, and throughout Anglo-American legal history have enjoyed, numerous procedural protections not guaranteed to civil litigants; consequently, state courts held that criminal defendants were not constitutionally entitled to an appeal directly following a conviction. In *Bedinger v. Commonwealth*, 7 Va. (3 Call) 461 (1803), the Virginia Supreme Court articulated the logic of this disparate appellate treatment for criminal and civil judgments:

> The tenderness and leaning of our code in favour of the criminal, the uncontroulable power of the jury to acquit in a criminal case, the pardoning power of the executive, and the objection to great delays in the execution of the criminal law, fully justify [the policy of not permitting an appeal in criminal cases].

Id. at 469 (opinion of Roane, J.). New York courts echoed these same sentiments:

> Nor is there any danger that innocence will suffer for want of a writ of error. Criminal pro-

> ceedings have thrown around the innocent so many guards, that the writ of error is almost useless. * * * If there be the least irregularity in the proceedings, the court must either grant a new trial, or recommend the party to a pardon.

Lavett v. People, 7 Cow. 339, 343 (N.Y. 1827); *see also ibid.* (justifying the different appellate treatment of criminal and civil errors based on procedures uniquely available to criminal defendants, including the requirement of proof beyond a reasonable doubt, the requirement of unanimity by the jury, the necessity of indictment by a grand jury, the right to a public trial and public examination of witnesses, and the right to counsel).

This traditionally disparate treatment of civil and criminal appeals is also evidenced by the federal courts. For many years, and through the ratification of the Fourteenth Amendment's Due Process Clause, the federal judicial system afforded a uniform right to appeal for civil litigants, but not for criminal defendants. *See* William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla. St. U.L. Rev. 1, 6 (1986) (noting that "before 1889 there had been for practical purposes no appeal whatever to any court from judgment of conviction in federal criminal cases," despite the fact that the Supreme Court had been "at the disposal of *every* losing [civil] litigant in a federal court who had the time and money to take an appeal") (emphasis added).

The historical discrepancy between the availability of appeals in criminal and in civil cases, grounded in trial-level procedural disparities still present today, permits a disparate treatment of civil appellate

procedure and criminal appellate procedure under the Due Process Clause. As a pragmatic matter, drawing distinctions between these types of judgments is defensible; criminal trials still are marked by procedural safeguards (proof beyond a reasonable doubt being the most significant) absent in civil litigation. By contrast, guaranteed access to post-judgment review is procedurally necessary to guard against unjustified deprivations of property in civil cases.

III. PUBLIC POLICY SUPPORTS AN APPEAL OF RIGHT FOLLOWING SUBSTANTIAL CIVIL DAMAGES AWARDS.

The same policy considerations that historically supported the right to appeal civil judgments continue to apply in modern litigation.

First, civil damages awards must be determined through the application of a uniform set of baseline procedural guarantees. The concern for uniformity motivated historical guarantees of appeals for such awards. *See, e.g.*, Rossman, 81 J. Crim. L. & Criminology at 549 ("Review [by appellate courts] provided a means for ensuring the uniform application of the law."). That same concern with baseline procedural uniformity, articulated repeatedly by this Court in recent punitive damages decisions, counsels in favor of a constitutional right to appellate access in cases involving substantial civil damages awards.

Second, notions of fundamental fairness have long counseled in favor of guaranteed appellate access for civil litigants. As the framers of the Constitution recognized, the absence of a guaranteed appeal in cases involving substantial deprivations of

property would undermine confidence in the judicial system; "were there no appeal [guaranteed for civil judgments], every man would have reason to complain, *especially when a final judgment, in an inferior court, should affect property to a large amount.*" Pamphlet of Noah Webster, addressed to Benjamin Franklin, on the proposed Constitution, October 10, 1787, in *Pamphlets on the Constitution of the United States* 53 (P. Ford ed. 1888) (reprinted 1968) (emphasis added). Indeed, from colonial times, appeals have been guaranteed in large part as a reaction to "the excesses to which litigiousness and a passion for juries could lead." Coffin, *Ways of a Judge* at 34. Those excesses, and a passion for trial by jury (particularly in West Virginia), are exemplified by this case. They are nothing new. The English and American legal traditions have addressed them through an appeal of right. West Virginia's unique failure to do so violates the guarantee of procedural due process.

Third, the burdens imposed by very heavy caseloads and the complexity of much contemporary litigation result in unprecedented opportunities for error by even the best qualified and wholly impartial trial judges. Both the number of rulings that trial judges must make, and the difficulty of the decisions that they must reach -- in terms of the multifacetedness of the facts they must consider, the complexity of the legal issues they must resolve, and the delicacy of the discretionary choices they must make -- substantially increase the risk of error from what it often was, historically. At the same time, the magnitude of verdicts today is such that the consequences of error may be devastating for litigants, and seriously damaging for others who depend upon and interact with them. These conditions of modern

litigation have rendered it imperative that litigants be given a guaranteed opportunity to have an impartial court of appeals review both the ultimate decision in their case and the underlying rulings that merged into that final judgment. Almost all States recognize this and afford statutory or state constitutional rights to appeal in civil cases involving substantial damages awards. When a state does not voluntarily afford such a guaranteed right, but makes the right to appeal subject to the unreviewable discretion of its courts, the Due Process Clause must be held to require the state to permit a meaningful appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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